plaintiff having failed upon a special count on the ground that the contract relied on could only be proved by a note or memorandum in writing, was held to be entitled to recover as on an account stated. After reviewing the authorities, Tindal, C. J. in delivering the judgment of the Court says at p. 870:—

> "And we think it sustainable also on principle; for, after the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand, that it is a debt which he is morally, if not legally, bound to pay, and which therefore forms a good consideration for a new promise; and the creditor, on the other hand, may reasonably be excused for not preserving the evidence which would have been necessary to prove the original debt before such admission. The principle may not, perhaps, be applicable to cases where it can be shown the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming; but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it."

Certainly the defendant was entitled to plead limitation, but having failed on that he has admitted his liability. Nor do I think that his liability was merely moral, or was a promise made without consideration. The fact that the defendant has had the use of the money since the date of the transfer of the account into the plaintiff's name, in my opinion, imports that valuable consideration was given.

Apart from the fact that Suppiah accepted the plaintiff as his creditor the mere allegation of a *jus tertii* in Seethai Achi would not be a defence unless the defendant could satisfy the Court that the deposit was actually the property of Seethai Achi and this he failed to do on the evidence before the Court. In the case of *Societe Coloniale Anversoise* v. *London & Brazilian Bank*, (1911) 2 K.B. 1024, the plaintiffs recovered against the Bank in respect of an account which stood in the name of the plaintiffs' former agent, one Kloz. Kloz had actually made a claim on the fund but although he was not represented at the trial, on the evidence the Court was satisfied that the account was in fact the account of the plaintiffs. The Court can only decide issues between the parties who appear before it. As Seethai Achi's personal representative was not before the Court, the judgment is not of course binding on her estate, and there is nothing to prevent such a personal representative from commencing proceedings for the purpose of establishing the claim of her estate (see *In re Richerson, Scales* v. *Heyhoe* (No. 2), (1893) 3 Ch.D. 146).

These considerations do not however affect the liability of the defendant to the plaintiff in the present suit. It has been argued that the defendant might conceivably be called upon to pay twice over. With that this Court is not concerned. The defendant has obtained a reduction of the amount assessable for estate duty by setting up this debt. If he had been honestly willing to discharge his obligations, but merely felt a doubt as to the party to whom the debt was payable, he could have protected himself by having the estate of Seethai Achi represented in this action. The judgment would then have been binding on all the parties who could possibly make a claim. As, however, he elected to use every means to avoid paying the debt at all, he has only himself to blame for the situation which has arisen.

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Appellant:—*Drew & Napier.*

Solicitors for the Respondent:—*Chan & Eber.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

February 23, 1935.

RE LEE CHOON GUAN, DECEASED.

LEW AH LUI (f) v. CHOA ENG WAN & ORS.

[SINGAPORE SUIT No. 253 of 1934]

[IN FORMA PAUPERIS]

Chinese marriage—Secondary wife—Requisite elements from which such marriage will be implied—Chinese divorce—Secondary wife—Requisite elements.

To prove a Chinese secondary marriage, though no ceremony need be proved, it is necessary to prove (a) long continued cohabitation (b) an intention to form a permanent union (c) repute of marriage. Recognition by the husband's family is one of the strongest forms of reputation of marriage.

A Chinese can divorce his secondary wife at will. No actual ceremony is needed; it depends on the definite intention to break off the relationship and the notoriety given to the fact of dissolution. *Re Sim Siew Guan, deceased*, (1923) S.S.L.R. 539, 1 Mal.L.J. 95, followed.

Trial of Action.

The Testator, Lee Choon Guan made a will by which among other gifts he bequeathed a share of income to his son, Lee Pang Seng and provided that after the death of Lee Pang Seng his widow should receive an annuity or monthly

sum of $300 per month and he also made a provision for the children of Lee Pang Seng.

Lee Choon Guan died on the 27th August, 1924 and Lee Pang Seng died on the 23rd February, 1930.

After the death of Lee Pang Seng claims were made upon the Trustees of the estate of Lee Choon Guan, deceased by various claimants who claimed to be widows or children of Lee Pang Seng. The Trustees accordingly commenced proceedings in Singapore Suit No. 121 of 1931 in which they asked the Court to give directions as to who were the persons entitled under the will of Lee Choon Guan to receive the annuity and other benefits given to the widow of Lee Pang Seng and to receive the benefits given to his children. All then known claimants were served with the proceedings and after some litigation the Registrar signed his certificate and the Court on the 1st December, 1931, gave a judgment following and giving effect to that certificate.

Subsequently another claimant, Lew Ah Lui appeared and claimed to be a (secondary) wife of Lee Pang Seng and as such entitled to share equally with the principal widow the annuity of $300 per month and other benefits given by the Will to the widow of Lee Pang Seng. She commenced an action in the Supreme Court *In Forma Pauperis* claiming, as one of the widows of Lee Pang Seng, the share to which she was entitled in the estate of Lee Choon Guan, deceased with all necessary consequential relief. During the progress of this action she also applied by way of Summons in Chambers in the said Suit No. 121 of 1931 to vary the Registrar's Certificate and to set aside the Judgment in that suit so as to give effect to her claim as a widow of Lee Pang Seng. The widow of Lee Pang Seng (Chee Suat Goh) who had not originally been made a party to Suit No. 253 of 1934 was added as a party on her own application and she pleaded that the claimant had never been a wife of Lee Pang Seng and also that if the Plaintiff, Lew Ah Lui ever had been a wife of Lee Pang Seng (which was denied) Lew Ah Lui had subsequently been divorced by Lee Pang Seng in his lifetime. The trial of Suit No 253 of 1934 and the application of Lew Ah Lui in Suit No. 121 of 1931 came on for hearing together.

Williamson for Plaintiff.

The Courts recognise that the Chinese are polygamous and have 'tsips' or secondary wives. Proof of a ceremony or rite is not necessary. It can be proved by oral or circumstantial evidence or both. *Cheang Thye Phin* v. *Tan Ah Loy* (1920) A.C. 369; *Re Seah Imm Swee Deceased, Seow Beng Hay* v. *Seow Soon Quee and others*, (1933) S.S. L.R. 7; 2 Mal. L.J. 111. Proof of a ceremony would be strong evidence of an intention to form a permanent matrimonial union—*Sunny Tay's Case*, 3 Mal. L.J. 83. In this case there is proof of a ceremony and cohabitation. It is a question of a ceremony and subsequent cohabitation. It is a question of fact in each individual case as to whether the parties intended to create a permanent matrimonial union or whether the evidence looked at as a whole is sufficient to raise a presumption of marriage. The law presumes against immorality in favour of marriage.

Page for the first four Defendants.

John Laycock and *T. W. Ong* for 5th Defendant: To establish a Chinese secondary marriage three elements must be proved (i) cohabitation long continued, (ii) the intention to form a permanent union, and (iii) reputation of marriage, of which recognition by the husband's family is the most usual and strongest evidence.

In *Sunny Tay's Case*, 3 Mal. L.J. 83 at p. 83, 84, the statement in the Judgment of Terrell J. that "proof of a ceremony would no doubt be conclusive" must be taken to be qualified by the later remark that "At most such ceremonies are only evidence of an intention to effect a permanent union." The intention to form a permanent union must be bilateral, not unilateral. The repute of marriage must be either general or bilateral and not confined merely to the lady's own circle of friends; who in any case will naturally prefer to the kindest construction on the lady's position.

The institution of divorce is old established and well recognised among the Chinese. *Re Choo Eng Choon, deceased.* 12 S.S.L.R. 120 at pp. 143, 183, 187, 188, 189, 199. 209; *Ngai Lau Shia* v. *Low Chee Neo*, 14 S.S.L.R. 35 at p. 48. *Mollendorf's* Family Law of the Chinese, p. 21. *Dyer Ball's* Things Chinese. p. 184. 185. 186. *Bryan* on Chinese Law. p. 18. Perak Order in Council, F.M.S. Enactments (1920) Revision. Vol. I p. 610.

Chinese divorces have in fact been officially recognised by the Courts of the Colony in *Nonia Cheah Yew* v. *Othmansah*, W.O.C. 22 and *Re Sim Siew Guan deceased*, (1933) S.S.L.R. 539; 1 Mal. L.J. 95. Also in the F.M.S. by the Perak Order in Council and in the case of *Lee Seang Neoh* v. *Low Hin Tuan*, 5 F.M.S.L.R. 154 at p. 163 etc.

TERRELL, J.—The Plaintiff alleges that she was a secondary wife of one Lee Pang Seng and as such is entitled to share with the 5th Defendant, who was Lee Pang Seng's principal wife, in an annuity of $300 per month provided under clause 18 of the will and clause 10 of the codicil to the will of Lee Choon Guan deceased. The first four Defendants are the Trustees of such will.

Clause 18 of the will directs the annuity to be paid to the widow of "my son or remoter male

issue dying before the distribution of my residuary trust estate" and Mr. Page on behalf of the Trustees argued that "the widow of my son" is a description of a *persona designata* and can only refer to the principal wife, the 5th Defendant. I am unable to accept this argument, which was not supported by counsel for the 5th Defendant, for the following reasons:

First, in clause 13 of the codicil the Testator declared that the word "widow" in clause 26 of the will only meant a widow who had been married with the full ceremonies of a first wife. If the Testator had meant that definition to apply to the use of the word "widow" in clause 18 of the will he could have said so, and in the absence of such definition the word must bear the ordinary interpretation which would be given to the word in matters affecting Chinese succession. Secondly in Malacca O.S. No. 30 of 1934 in the matter of the Trusts of the will of Low Guan Swi, deceased etc. a similar point arose and by an Order made upon a Summons in Chambers of the 11th December, 1934, Prichard J. declared that the first Defendant who was a secondary wife, was entitled as a widow of Low Kav Whay deceased under the will of Low Guan Swi deceased and by my judgment on the O.S. dated the 15th February, 1935, I followed the Order of Prichard J. and declared that the principal and secondary wives were entitled equally between them to the benefits to which "the widow of Low Kay Whay" was entitled under the will.

Accordingly, so long as the decision in O.S. 30/34 stands, the point is no longer open for argument and if the Plaintiff can establish that she is a secondary wife she will be entitled to share equally with the 5th Defendant the benefits referred to under the will and codicil of Lee Choon Guan deceasesd.

The evidence established that Lee Pang Seng who was the son of very rich parents first met the Plaintiff in 1918, having been married some years previously to the 5th Defendant as his principal wife. The Plaintiff was the daughter of very humble parents who at the time occupied a single room in Upper Chin Chew Street. At the time that Lee Pang Seng met her the Plaintiff's father, who had been a hawker, was out of work, and, for his status in life, had considerable debts. The Plaintiff was then 16 and of marriageable age and her parents handed a photograph of her to one Ah Chew or Chow Chew who was a broker who introduced singing girls to clients and he showed the photograph to Lee Pang Seng. I do not accept the suggestion that at this time the Plaintiff was a singing girl. In fact. according to the evidence of Kwek Ah Lin. Ah Chew's wife, Ah Chew assured Lee Pang Seng that the Plaintiff was a virgin. Although I accept the evidence that the Plaintiff was not a singing girl, it is nevertheless significant that the Plaintiff's parents in approaching Ah Chew were clearly not trying to arrange a marriage with a man of their own class. Ah Chew was not the usual go-between but a person who carried on an ancient and not very respectable trade, which might well be described in less flattering terms than that of a broker. Through the broker the Plaintiff met Lee Pang Seng on two occasions and the matter was arranged. Lee Pang Seng paid the parents $1,000. Some of this was spent on the Plaintiff's clothes and some on a marriage feast for 30 persons. As the feast only lasted an hour or so, one cannot suppose these two items consumed even the major part of the $1,000. It was admitted that some of the money was spent in paying the parents' debts. To all intents and purposes the Plaintiff was sold to Lee Pang Seng.

I am quite willing to believe that on the occasion of the Plaintiff leaving her parents' lodgings for Lee Pang Seng's flat in Pagoda Street certain ceremonies were performed for instance, that the Plaintiff's hair was dressed, that she offered prayers, that she wore a red robe and that the car which Lee Pang Seng sent to fetch her was decorated. I have always referred to the so called marriage feast which was however confined to friends of the Plaintiff's parents. I do not attach very much significance to the raising of the veil by Lee Pang Seng on arrival at the flat in Pagoda Street. It appears to me that this was a natural act which would have taken place whatever the Plaintiff's status. On the third day the Plaintiff and her attendant returned to her parents' house. Lee Pang Seng did not accompany her and never paid respect to the Plaintiff's parents. He did however give the attendant some money to make a present of pork to the Plaintiff's parents.

I quite recognize that in a case of this kind it is dangerous to accept at its face value the testimony of the Plaintiff and those immediately concerned with her as to what ceremonies took place. I think, however, that even the poorest parents would not be so hard hearted as to launch their daughter on a new life, which to her must have meant everything, without providing some display and going through some ceremonies to mark the occasion. The most noticeable point about the ceremonies is, however that they are entirely one-sided, Lee Pang Seng himself never attended at the house of the Plaintiff's parents, still less did any member of his family take part in the ceremonies, and it is indeed admitted that the Plaintiff never even met any member of Lee Pang Seng's family at the time of the alleged marriage, or

even subsequently with the possible exception of Choa Eng Wan who married Lee Pang Seng's sister and met the Plaintiff on one occasion at the Twilight Club some three or four years later.

The place in Pagoda Street to which the Plaintiff went, was a three room flat apparently rented by one Lee Kee Cheok, who had a secondary wife or mistress occupying the same flat. The witness Loong Fook San, who is employed in the Chief Police Officer's office, says that he lived in Pagoda Street from 1910 to 1920 and that the flat was Lee Kee Cheok's. He only saw Lee Pang Seng once or twice during the whole period.

The Plaintiff says that at first Lee Pang Seng gave her $250 per month which was later reduced to $200 per month. He also gave her jewellery. She lived in Pagoda Street for four years. Towards the end of the period Lee Pang Seng's visits became less and less frequent and he finally gave her no more money and abandoned her. During the whole of this time Lee Pang Seng was living with his principal wife at the family house at Tanjong Bungah and according to Mrs. Lee Choon Guan, Lee Pang Seng was obliged to sleep there every night so long as his father was alive. His visits to Pagoda Street can never therefore have been more than casual and intermittent. He never lived there as his principal or even temporary abode.

During the time that the Plaintiff cohabited with Lee Pang Seng she says that she had a still-born son. As the child did not live no significance attaches to this incident. If it had been of importance I should have required it to be more strictly proved.

The Plaintiff after her desertion by Lee Pang Seng carried on for some time by pawning her jewellery. She also made ineffectual efforts to get him to return. In particular she asked one Tan Cheng Siah to see Lee Pang Sang on her behalf. Tan Cheng Siah did so and brought back a message that she had been unfaithful, that he would give her no more money and would have nothing more to do with her. Being destitute the Plaintiff was driven to prostitution and in 1924 met one Lew Ah Wee who kept her for some 8 years. In 1925 Lee Pang Seng was declared a bankrupt and in 1930 he died in China. Between 1922 and Lee Pang Seng's death there was no communication between the Plaintiff and Lee Pang Seng whatever.

Lew Ah Wee seems to have had a real affection for the Plaintiff. He prevailed upon her to give up her life of prostitution. At first the Plaintiff says she was unwilling to follow him as he had the same 'seh' name, but afterwards she bore him one or two children. Lew Ah Wee says he would have married her if he had been free, but he was a Christian and already married, and that, so far as he was concerned, was the only reason for his not marrying her. She never told him that she was already the wife of Lee Pang Seng.

The question then arises, what inference is to be drawn from the facts as found. In a recent case, *In the matter of the Trusts of the will of Tay Geok Teat, deceased*; *Sunny Tay v. Seow See Neo and anor.*, 3 Mal.L.J. 83, (hereinafter referred to as *Sunny Tay's* Case) I reviewed the authorities and extracted from them an indication that in cases such as the present the evidence must establish an intention to effect a permanent union, and that there must be satisfactory evidence of the recognition of the marriage. If the intention and recognition are satisfactorily established the proof of ceremonies is superfluous, and the Privy Council has held that a ceremony is not essential (see *Tan Ah Loy's* Case, (1920) A.C. 376). In the course of my judgment in *Sunny Tay's* Case I stated "Proof of a marriage ceremony would no doubt be conclusive" but this statement must be read in connection with a later sentence where I stated "At the most such ceremonies are only evidence of an intention to effect a permanent union." It would perhaps have been more correct to say that a proof of *certain* marriage cermonies would be conclusive. It has never been decided in any of the reported cases what marriage ceremonies are essential even for a first wife marriage though a great deal of evidence on the point is recorded in the *Six Widows'* Case, 12 S.S.L.R. 120. As in the case of a secondary marriage ceremonies of any kind are unnecessary, such ceremonies as are proved to have been performed are only valuable as far as they go as proof of intention and of recognition. If, for instance, it could be proved that the husband paid respect to the wife's parents and that the wife paid respect to the husband's parents and in particular to the husband's principal wife and that she was introduced to the male members of the husband's family such proof might well be conclusive, as there could be no better evidence of an intention to effect a permanent union and the ceremonies themselves would provide evidence of recognition. That would be the natural inference without any proof of what ceremonies were or were not necessary or usual according to Chinese custom. Ceremonies which are only partial and particularly ceremonies which are only on the wife's part are inconclusive and, particularly so far as the husband and his family are concerned, provide no evidence either of an intention that the union should be permanent or of recognition. It must I think, be conceded that the intention to contract a

permanent union must be a common intention, and that the requirements of a secondary marriage will not have been met if one of the parties merely intended a casual connection.

It is however, necessary to consider further my judgment in the *Sunny Tay* Case, *(supra)* in view of the fact that it was reversed on appeal. The judgment, was, however, reversed entirely on fact as is indicated by the following passage amongst others, from the judgment of Mills J. who alone delivered a written judgment in the Appellate Court. He says at p. 89 of the report. "In the first place my general impression of the evidence given by the witnesses for the Plaintiff is favourable. Here again I differ from the trial judge whose impression was unfavourable etc." There is, however, throughout the judgment of Mills J. no criticism of the propositions of law laid down by me except on one point. In the Court below, following the decision of the Privy Council in the *Khoo Thean Tek* Case, (1930) A.C. 346, I had ruled that the recognition of the children raised no presumption of the marriage of the parents. Mills J. however does not entirely accept the ruling of the Privy Council and has held that such recognition is a factor which taken into consideration with other factors may help to raise such a presumption. This ruling may be of importance in a case where there has been recognition of children, but has no application to the facts of the present case as no child was born alive. Apart from this point there is no comment, and in the absence of such comment it must be presumed that the propositions of law laid down at the trial were accepted by the Court of Appeal.

Mr. Laycock, on behalf of the 5th Defendant, submitted that the onus was on the Plaintiff to prove three things: (a) cohabitation, (b) an intention to form a permanent union, and (c) recognition. In the alternative he argued that if the Plaintiff had at any time had the status of a secondary wife, she had been divorced.

It is not disputed that there was cohabitation.

As regards (b), there may or may not have been an intention to effect a permanent union on the part of the Plaintiff and her mother, but even accepting the evidence of such ceremonies as are said to have been performed, I do not think that they are conclusive. The parents were in fact handing over their daughter to Lee Pang Seng, the son of a very rich man in consideration of what must have appeared to them to be a large sum of money. Lee Pang Seng never paid respect to them, or even came to see them. He never provided a home where he lived even intermittently, but merely kept the Plaintiff in a flat which he either shared with another man or which he merely used for the purpose of his intercourse with the Plaintiff. It is quite possible to infer that the ceremonies such as they were, were only designed by the parents to keep face with their friends and, very naturally, to spare the feelings of their daughter so far as possible.

Even, however, taking the view most favourable to the Plaintiff, all that has been proved is an intention on the part of the Plaintiff to effect a permanent union. There is no evidence of any such intention on the part of Lee Pang Seng. In addition to his own absence from the ceremonies and to the fact that the members of his family knew nothing about the supposed marriage, there is the fact that after about four years he discarded the Plaintiff in favour of a singing girl. The fact that the association was severed is in itself evidence that the union was not intended to be permanent, not perhaps so strong as it would be if there had been a son who had lived as in the *Khoo Thean Tek* Case, (1930) A.C. 346, but nevertheless it is evidence which does raise a definite presumption. Lastly it must be remembered that the union only lasted for just over 4 years and at the end of the period Lee Pang Seng's visits became more and more intermittent. On the other hand Lee Pang Seng lived for eight years after that and the Plaintiff made no claim upon him. This cannot have only been due to his insolvency as he was not declared bankrupt until 1925, three years after the association was severed, and during the period between 1924 and 1932 the Plaintiff followed Lew Ah Wee who, if he had been free, would have married her and she never told him that she was already married.

As regards (c), the evidence of recognition called by the Plaintiff was almost negligible. Apart from the Plaintiff and her mother, there was the evidence of Kwek Ah Lin who never saw the Plaintiff after 1918 until a few months ago and cannot speak of any reputation of marriage. Then there was Ngan Ah Lim who said she was present at the ceremonies but never stated that afterwards the Plaintiff was known as the wife of Lee Pang Seng. Another witness Loong Fook San lived opposite the flat in Pagoda Street between 1917 and 1923. All that he knew about the marriage was what his relative Low Chan had told him. Low Chan had a business in Pagoda Street and was called as a witness. He did not know the Plaintiff. He said that people said the Plaintiff was a bride; he did not know whose bride and he did not know Lee Pang Seng. Finally in answer to the Court he said "I know nothing. I was subpoenaed."

All this evidence amounts to very little, and so far as Lee Pang Seng is concerned his family did not even know of the existence of the

Plaintiff until long after Lee Pang Seng's death, and in this connection Dr. Tyau, the Consul General for China, has given the following evidence. He said:

> "If she was kept without the knowledge of the family, she would not be a concubine." (i.e. secondary wife).

Viewing the evidence as a whole, I have no doubt that the Plaintiff has entirely failed to discharge the onus placed upon her and that she has not proved that she was a secondary wife or 'tsip.'

This finding is really all that is necessary to decide the case. In view, however, of the possibility of the judgment being reversed on appeal, I consider it advisable also to record a finding on the issue of divorce. The case of the 5th Defendant is that even if the Plaintiff ever acquired the status of a secondary wife, such status was lost by divorce prior to Lee Pang Seng's death.

Now on the subject of divorce expert evidence was given by Dr. Tyau, Consul General for China. He was asked "can a man divorce his concubine?" In reply he said:

> "Since my arrival in Singapore questions of this nature have frequently cropped up. I find the general opinion here with regard to concubinage is not quite the same as held in China. A concubine here has been given a position far higher than in China."

and later he says:

> "As to Singapore, I cannot give a decided opinion, but if they follow Chinese custom it should be the same. A Chinese Magistrate never interferes with a divorce arranged by mutual consent—it was recognized."

In view of the fact that in the Straits Settlements secondary wives have a far higher status than in China where even the principal wife is only entitled to maintenance and has no share in the corpus of an intestate estate, and in view of the Consul General's admission that the local customs as to divorce do not necessarily follow Chinese customs and that he cannot say what they are, I have not thought it necessary to consider the various text books to which I was referred and which profess to give Chinese law on the subject. I prefer to consider how far divorce has been recognized in local decisions.

The first case to which I was referred was that of *Nonya Siu* v. *Othmansah Marican*, W.O.C. 22 and which contains the judgment of Sir Benson Maxwell, the Recorder. In that case the question was whether the Plaintiff had contracted a subsequent marriage, but the learned Chief Justice accepted a previous finding of the Recorder that a divorce by mutual consent had been clearly established. Then in the *Six Widows'* Case, 12 S.S.L.R. 120, there are various references to the possibility of a divorce, on p. 143 in the judgment of Sir A. Law, C.J., at p. 183 in the judgment of Sir William Hyndman-Jones, C.J., at p. 199 in the judgment of Sercombe Smith, J. and at p. 209 in the judgment of Thomas Braddell, J. Most of these passages refer to the opinions of text book writers as to the Chinese law on the subject, and accordingly for reasons stated above, I do not think it necessary to refer in detail to any of the judgments except to that of Braddell, J. at p. 209 where he says:—

> "I entirely adopt this exposition of the Chinese law given in the judgment of the Chief Justice and concur with him in the conclusion at which he has arrived, namely that concubinage is recognized as a legal institution under Chinese law conferring upon the 't'sip' a legal status of a permanent nature which *subject to divorce*, entitles her to maintenance during her life time."

Again it may not be irrelevant to refer to the Perak Order in Council which recognizes certain Chinese customs in the State of Perak. Section 1 (iii) of the Order provides that if the husband of a woman is absent for three years and neglects to provide for her proper maintenance, the woman may remarry without the permission of the Court. This Order has of course never been law in the Straits Settlements but it indicates a definite custom which has been held to be applicable to Chinese residing in other parts of the Peninsula.

Apart from these references, there is, however, the direct authority of the case of '*In the Estate of Sim Siew Guan deceased*, Singapore Probate No. 321 of 1923, (1933) S.S.L.R. 539; 1 Mal.L.J. 95, Sir Walter Shaw, C.J., decided that a Chinese could divorce his secondary wife for various reasons. On p. 542 of the report the judgment of the learned Chief Justice reads as follows:—

> "The only evidence he had of the manner in which that could be done by Chinese custom was the evidence of the Consul-General for China, who had stated that divorce was recognized, that it was at will of the husband, who was entitled to divorce his wife if she were disobedient to himself or his principal wife, if she did not conform to the household regulations, or was guilty of immoral conduct. The custom was that the husband should notify the dissolution either to his near relations or to his clansmen. It appeared

that the dissolution was something like the inception of the union, that no actual ceremony was needed, and it depended upon the actual intention and notoriety given to the union or dissolution.

"In the present case there was evidence that there was a disturbance in the house, and that Tan Sai Im was accused of improper conduct and was turned out of the house. Three witnesses were called to give evidence that the husband told them what had happened, and that he had ceased to have anything further to do with her. If that evidence was to be believed it certainly constituted a divorce according to the evidence of custom given by the Consul-General. There were several circumstances which seemed to point to the inevitable conclusion that the parties thought that the dissolution was complete. He had come to the conclusion that the evidence of the defence should be accepted, and that Tan Sai Im was not, at the time of Siew Guan's death his secondary wife. The answer to the issue would be that Tan Sai Im was not a lawful widow of the deceased."

Lastly, in the *Khoo Thean Tek* Case (1930) A.C. 346, the Privy Council at p. 353 accept the evidence of Mr. Beatty, who was called as an expert in Chinese customs, that a *t'sip* could not be put away who has borne a son. This implies that if she has not borne a son she can be put away.

I accept with respect the reasoning of Shaw, C.J. that just as in the case of the formation of a secondary marriage, its dissolution can be proved by intention and repute.

Applying these principles to the facts of the present case, it has been proved that the Plaintiff was deserted by Lee Pang Seng some time in 1922. Thereupon she sent Tan Cheng Seah to intercede with Lee Pang Seng on her behalf. I accept his evidence on this point. He says:

"She did ask me in 1922 to see Lee Pang Seng about the allowance. Lee Pang Seng said she was unfaithful and that he would not give her any more money. He said he would not have anything more to do with her. I told the Plaintiff. She said nothing."

This does not of course prove that she was unfaithful, but it does prove a definite intention to break off the relationship which was communicated to her and which by her subsequent conduct she accepted. I have already referred to the fact that she had no further communication with Lee Pang Seng until his death 8 years later and during the 8 years of her intimacy with Lew Ah Wee she never told him that she was married.

I have already intimated that the fact of the severance of the relationship after four years is not as conclusive as it would be if there had been issue to raise a presumption that there had never been a marriage. If, however, there was a marriage and no issue, the presumption is all the stronger that there was a divorce.

I find accordingly that if there was a marriage by intention and repute, there is ample evidence that the marriage was similarly dissolved and that accordingly the Plaintiff cannot claim to have the status of having been a secondary wife of Lee Pang Seng after 1922.

Action dismissed.

Application in Suit 121 of 1931 dismissed.

Solicitor for Plaintiff (Lew Ah Lui):— *R. Williamson.*

Solicitors for 1st, 2nd and 3rd Defendants (Trustees):— *Allen & Gledhill.*

Solicitors for 5th Defendant (Chee Suat Goh):— *Braddell Brothers.*

[APPELLATE CRIMINAL JURISDICTION]

HUGGARD, C.J., PRICHARD & TERRELL, JJ.

January 12, 1935.

REX vs. LATIP BIN HAIDIN

[SINGAPORE CRIMINAL APPEAL No. 58 of 1934]

[MALACCA CRIMINAL APPEAL No. 8 of 1934]

Ordinance No. 45 (Common Gaming Houses) Ss. 4 (d) and 4 (c)—selling lottery tickets and assisting in carrying on a public lottery.

A *bona fide* private lottery cannot become an illegal lottery by the unauthorised act of a single one of its members in selling tickets to the public. A lottery only becomes a public lottery if the public or any class of the public has or may have access to it. But a person may make use of tickets in a private lottery for the purpose of promoting or organising a separate and distinct lottery of his own and if he does so then such subsidiary lottery is deemed to be a public lottery until the contrary is proved and will subject persons assisting in carrying it on or selling tickets therein to the penalties prescribed by the Ordinance.

Magistrates Appeal.

The Malacca Magistrate convicted the accused on two charges of (1) selling lottery tickets contrary to S. 4 (d) of Ordinance No. 45 (Common Gaming Houses) and

(2) Assisting in carrying on a public lottery contrary to S. 4 (c) of the same Ordinance.

The accused appealed from the conviction and on the request in writing of the Public Prosecutor made under S. 299 (3) of the Criminal Procedure Code the appeal was reserved for hearing and came on for hearing at Singapore on